No. 12515

United States
Court of Appeals
For the Ninth Circuit

RALPH BARRY, as Trustee in Bankruptcy of CENTRAL AUTO SUPPLY COMPANY, a corporation, Bankrupt,
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, and THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,
Appellees.

Opening Brief of Appellant

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TABLE OF CASES AND AUTHORITIES CITED

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STATEMENT RELATIVE TO JURISDICTION

This is an action by a Trustee in Bankruptcy, to avoid an alleged illegal transfer of the bankrupt's personalty and to recover possession thereof for the benefit of general creditors. The District Court had jurisdiction under Section 70(e)(3) of the Bankruptcy Act, 11 U. S. C. Chapter 7, Section 110(e).

The appeal is from a judgment of the District Court adverse to the plaintiff-trustee. The Court of Appeals has jurisdiction under Section 1291, Title 28 U. S. C.

While other matters are assigned as error, the principal question to be determined upon the appeal, as it appears to appellant, is:

Does the judgment of the District Court erroneously nullify Section 62-522 of the Arizona Code of 1939, which reads:

> "*Chattel mortgage of merchant's stock void.*— A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

STATEMENT OF THE CASE

With the permission of the court, the parties will be referred to here by name or as they appeared in the court below, i.e., appellant as plaintiff and the appellees as defendants.

As will be observed from the transcript of record, the pleadings, evidence, findings and conclusion are somewhat voluminous, although there is little or no factual dispute.

In order to succinctly state the legal controversy between the parties, plaintiff believes it may be fair to state that his action challenges the validity (as being

repugnant to Section 62-522 of the Arizona Code of 1939) of a plan of "field warehousing" attempted, prior to bankruptcy, by the bankrupt corporation, one of its creditors (Valley National Bank of Phoenix) and the other defendant Lawrence Warehouse Company.

Defendants contend that such plan of "field warehousing" finds sanction in the Uniform Warehouse Receipts Act (Chapter 52, Article 8, Arizona Code of 1939) and is in all respects valid.

If such plan, and the operations of the parties thereunder, are lawful, then the judgment appealed from is correct and should be affirmed. If not, plaintiff, as trustee in bankruptcy of the bankrupt corporation, is entitled to the possession of the goods in controversy, for the benefit of the general creditors of the bankrupt under the provisions of Section 70 of the Bankruptcy Act.

The "field warehousing" arrangement, as disclosed by the evidence, is simply this:

Central Auto Supply Company, a retail dealer in merchandise, executed a lease of a portion of its showroom and warehouse to Lawrence Warehouse Company (Tr 40-46).

The warehouse company erected partitions or wire fences along the lines of such leased portion of the building, as shown upon a blueprint thereof, which blueprint is attached to and made a part of the lease (Tr 47; 93) and also posted signs, advising those who

visited the premises that everything behind such partitions or fences was under the control of the warehouse company.

Central Auto Supply and Lawrence Warehouse Company also executed a document denominated "Field Warehouse Storage Agreement", contemplating the storage of the supply company's goods and merchandise in that portion of its showroom and warehouse which it had previously leased to the warehouse company (Tr 63-68).

The supply company then bought merchandise on credit from wholesalers, jobbers and manufacturers all over the country (who did not see the signs or the fence or have any information or knowledge concerning the "field warehousing" arrangement) who shipped goods directly to the supply company (Tr 120-148).

As soon as such goods were received by the supply company, it put them behind the fence and the warehouse company issued a non-negotiable warehouse receipt for them to the bank. The bank loaned money to the supply company upon the security of such receipt, (Tr 97-98; 169) although the bank knew that the supply company was buying the goods on open account and not paying for them. (Tr 222-223).

The warehouse company had employees on the premises at all times. These employees were paid by the warehouse company, who was reimbursed therefor by the supply company (Tr 82). Most of such em-

ployees had been in the employ of the supply company until the "field warehousing" arrangement was worked out. (Tr 191-192).

Several of the witnesses testified as to how sales to customers of the supply company were handled, and there is little, if any, conflict in the testimony in that respect. Plaintiff took the deposition of C. W. Saxon, former manager of the supply company (Tr 178) and defendants introduced such deposition in evidence (Tr 151). To plaintiff, it seems to be fairly in line with the testimony of the other witnesses as to the manner in which sales to customers of the supply company were conducted after the "field warehousing" arrangement went into effect, and he, therefore, quotes from it as follows:

> "Q. Now with respect to the portion of the property that you used, was some of that divided off by wire partitions?
>
> "A. Yes, sir, it was. . . .
>
> "Q. Mr. Saxon, I show you a document that is marked Plaintiff's Exhibit A consisting of three pages, the last one being a blueprint, and the blueprint itself being marked Exhibit A, Lawrence Warehouse Company, Phoenix, Arizona, Arizona Warehouse Number 21, and ask you if that fairly and accurately represents the premises you have been describing and if the red lines denote the partitions that you have mentioned.
>
> "A. That is right.
>
> "Q. Now, during the period that you were manager there will you describe to us how sales

were made by you, where the goods or property sold were within the partitions shown within the red lines on the exhibit I have handed you?

"A. In other words—

"Q. Just what was done, how it was handled?

"A. About 80 per cent of our business, of course, was sold out the back door or was delivered by a delivery boy. There were some sales over the counter, but the majority of the sales in our particular type of business come in over an order desk. A man fills the order out of the storeroom, and he is in charge of the delivery boy who then makes the delivery. As far as the counter sales are concerned, some sales go out over the counter, and even some sales that would be made up from our order desk in the rear would be picked up at the counter by the customer. Now we had—the setup in the plant was that we had an order desk man on full time and a counter man on full time, and sometimes we had during part of that period, we had as high as two and three counter men and assistant order desk men.

"Q. And did you have any stock down there that was not within these partitions that are shown here?

"A. Yes, we did have. We had considerable stock of wire and such in the carburetor and electrical section. However, if I am getting this correctly, that was never carried under Lawrence inventory. The only thing outside that we had would be items that were in display.

"Q. Well, on a sale of items that were not within the Lawrence inventory, was that treated

any differently as far as handling it was concerned than a sale of items that were within the Lawrence inventory? . . .

"A. Well, yes, to a certain extent. For example, in the sale of rebuilt motors, which was the largest amount of sales we had—when I said 80 percent of the sales were out the back door, I am speaking of sales out of the warehouse. We did make certain sales out of our shop handled in an entirely different manner than the sales out of the warehouse. We had a man on the order desk that was the warehouse manager We were constantly taking parts from the warehouse into the shop. Now of course, those were charged out of Lawrence by the Lawrence Warehouse manager, but the sale was consummated on an entirely different type of ticket. That would be the greatest deviation from regular sales that we had. . . .

"Q. I see. Now if a customer came in to buy an item that was within the Lawrence inventory as you have mentioned, just tell us how that transaction would be handled.

"A. For example a counter sale?

"Q. A counter sale.

"A. Well, the customer would come in—do you want all the mechanics of the sale?

"Q. Yes.

"A. A customer would come in, approach the counter, and would tell the counter man what it is he wanted. Now the counter man would go to stock, into the stockroom, bring out the parts and make out the counter ticket in triplicate, and made

the ticket up according to the parts that were sold, the proper discounts, and actually handled it even down to receiving the money for the same, and in many cases, in some cases it was sent to the Cashier.

"Q. The counter man, was that an employee of the Central Auto Sales or the Lawrence Warehouse?

"A. The counter man was a regular Lawrence Warehouse man.

"Q. A Lawrence Warehouse man?

"A. That is right.

"Q. Did you have anyone in your firm that made sales direct?

"A. Yes, we did, although we were the—we were set up in this manner, we would not make any sales at any time unless a Lawrence Warehouse man was present. So for that reason we had to stagger the shifts of the Lawrence employees so when we were down where we had a few employees we would either have an order desk man in there or the Lawrence Warehouse man, but we did attempt one time to—and didn't meet with much success, I may say—of attempting to get Lawrence to allow us to make sales even though their man wasn't present because it was getting to the point we were losing a considerable amount of money and couldn't maintain a large group of personnel, so they did say we could make sales, which I made several of and you fill find in the recap of sales tickets, people's initials on there who were not Lawrence men, but they wouldn't definitely let us

make any sales unless a Lawrence man was there.

"Q. Was that common practice for you or someone else to make sales out of your stock, that was not an employee of the Warehouse Company?

"A. Yes, if a Lawrence employee was present.

"Q. Was there any change in the procedure during the time you were there as manager?

"A. Do you mean in sales procedure?

"Q. Yes.

"A. Well, about the only change of any magnitude was that when I came with the company they had no salesmen at all, that is, outside salesmen, and we did build up a small sales force, but as far as the ticket handling and everything, there were no changes made that way.

"Q. You referred to sales out the back door, what do you mean by that?

"A. Sales that the customer doesn't appear to buy merchandise but makes a phone call. For example, a man has a garage, and he is by himself in the garage. He can't close his garage to come in town. He calls in. That would be most of the orders that we sold. He would call in and call the order desk. The order desk was presided over by the warehouse manager. He would get the call and either he himself, or we did have from time to time until we finally got down to absolute rock bottom, assistants who worked under him, who were also on Lawrence, who would make the orders out, and the order desk man would make out the tickets and the delivery boy deliver them.

"Q. Who got the money?

"A. The money was regular billing form where they have sales that came back in over the order desk, and it was filled at the end of the month.

"Q. In the first instance a purchaser making a purchase there, would that remittance go to your company or the Lawrence Warehouse Company, do you understand what I mean?

"A. I think I do.

"Q. If for example, I went in and bought $5 worth of stuff and gave a check for it, would that go to the Central Auto Sales or to the Lawrence Warehouse Company?

"A. The check itself—there is a couple of ways we can approach this, I hope I can make this clear. All billing naturally was taken—was made payable to Central Auto Supply because we felt that Central Auto Supply was in the business of selling auto parts, not Lawrence Warehouse, even though they had control of them. We did at the same time—I might say that most of the money or a great share of the money that came in as the result of those sales had to in turn be paid out for Lawrence payrolls and also for—depending on what our loan was at the bank, to keep our loan more or less even with them.

"Q. In the first instance, however, the purchaser paid the money to Central Auto?

"A. The billing was made out that way.

"Q. The actual remittance was received that way?

"A. Yes." (Tr 180-186).

"Q. Now, distinguishing between the Central Auto Supply employees and the Lawrence Warehouse employees, would the Central Auto Supply Company employees have access to the merchandise?

"A. During working hours it was open, the place was open. We had access, we weren't kept out of there, no.

"Q. Would one of your employees as distinguished from the Lawrence Warehouse Company go in and get items of merchandise and take them out?

"A. That would happen, for example, when, say one of our employees might be assisting the regular counter man in making sales.

"Q. Independently of that would it happen?

"A. They all went over the counter, everything that went out of the back door was presided over by the warehouse manager and everything over the counter by the counter man.

"Q. Assume that I had ordered something over the telephone from you and it was delivered to me in the way you have detailed here, would there be anything to indicate to me that I was purchasing property of the Lawrence Warehouse Company?

"A. To indicate that you were purchasing property of the Lawrence Warehouse Company?

"Q. Yes.

"MR. RAY: I object to the question, it presumes a fact not in evidence that this was the

property of the Lawrence Warehouse Company, or that the Lawrence Warehouse Company claimed it to be its property.

"MR. PERRY: I think on that I will just withdraw the question." (Tr 188-190).

Robert E. Kersting, former President of Central Auto Supply Company stated:

"Q. And after the execution of this lease, you just tell the Court how the business was operated with reference to what your Company did, and what the Lawrence Warehouse Company did, so we will have a picture of how the operations were conducted.

"A. Well, just a small prologue, and not to take up the time of the Court or anything, but we were in certain financial difficulties due, mainly, to the strike of our major suppliers, the Seal Power Corporation. This Company was responsible for a little over 50 per cent of the volume of our sales. They went on strike and remained on strike for eight months. We took no deliveries and that explains our financial stress, and we went first, I believe to the Valley National Bank in the hopes of getting some type or some form of financing that would help carry us through this strike period, for, of course, we had no idea it would last for seven or eight months, we hoped it would be over in two or three weeks. I don't know exactly how it came about, but at least in cooperation with the Valley Bank and the Lawrence Warehouse Company, a Lawrence field

warehouse application was necessitated, which you have just introduced in evidence here. My understanding of that operation was roughly this: I don't claim to be an authority on the technical parts of it, but we had certain inventories, certain merchandise in the shop at the time. In order to increase our volume we wanted to increase our inventory to more adequately compete with the other plants in the area here. The bank and the Lawrence Warehouse showed us that if they could control a certain portion of our building, a certain portion of our inventory; that is, the portion of the building which would contain our inventory, and through some operation of some type of warehouse receipt, if we would pledge that inventory that was already there and then also the new inventory as it came in, that is, as it was purchased from our distributors, and if we allowed them to keep complete control of that inventory as to what came in and what went out, the Valley Bank then would lend us a certain sum of money, a certain percentage on the cost value of that inventory as against these warehouse receipts or whatever they were, whatever we wanted to technically call them. The percentage of the loan from the Valley Bank, I believe, ran somewhere between 50 and 60 per cent. It varied up and down for a time, and we, of course, the unfortunate part of it was, we never knew what it was going to be. The next morning it would be cut down to 10 per cent, and we could be out of business by having to immediately pay the Bank that amount. As our inventory came in

and came in higher, of course, we were entitled, technically, to more money, more of a loan on that pledged inventory to the Bank. As I understood it, the warehouse system was merely the middle man to control and check on that inventory and see what happened to it, supposedly, and the Bank, in turn loaned us money on what was pledged.

"Q. Now, the portion of your warehouse or storeroom, or whatever it was that was leased to the Lawrence Warehouse Company as shown in the red lines on the pledge I showed you a few moments ago, how was that separated from the balance of the building?

"A. Either by walls or built over wire gauging similar to chicken wire, and at the close of business each day it was more or less self contained in this chicken wire, in some cases by folding doors which could be folded shut and then locked with a padlock.

"Q. Now, was there any portion of your stock of merchandise that was offered for sale that was not contained within this area that was enclosed by chicken wire or walls or the area that is shown on the plat in red?

"A. Yes. For a time there was a small portion of it in a smaller building next to the main building known as the carburetor and electrical shop. There was a certain inventory kept in there that was not in the warehouse system, and also there was our larger machine shop in the rear which was not contained in the warehouse, and there were certain parts out there at all times, of course, of considerable value.

"Q. In percentage, would you say that the greater portion of your stock was within this enclosure that you mentioned?

"A. I'd say at least 90 per cent, possibly more than that.

"Q. At all times?

"A. At all times.

"Q. Now, will you just tell the court, assuming that a purchaser came in to buy an item while this arrangement was in effect, what the operations were that resulted in the sale and delivery to him of whatever he wanted to purchase?

"A. If a purchaser came in the front door, you mean, in person?

"Q. Yes.

"A. In this case? Well, he would walk up to the counter and he would ask for gasket for a Model A Ford, which we never had, and the man at the counter would go back to the stock and withdraw that gasket for a Model A Ford and bring it out to him and ask him whether it was charge or cash. If it was cash, he would pay his $2.28 in cash and get a ticket. On the ticket, which would be a Central Auto Supply invoice, it would show 'One Gasket, $2.28, paid.'

"Q. This is a cash sale?

"A. This is a cash sale, yes. The counter man would take the money and give it to the Cashier and she would ring it up as cash. If it were a credit sale the same thing would happen except the money would not be transferred, would be written up on the invoice as a charge to a certain

company, and the customers would sign for the charge. Now, that was the outside part of it. Now, you want—

"Q. Go right ahead.

"A. The inside part?

"Q. Yes.

"A. Then, operating under the Lawrence System, and again, now, I am just speaking from the association I had there from what I saw and what I know. Now, there might be some technical parts I am not right on or don't know about, because it was a little complicated, I will grant you that. As I understood it, that counter man would then take his tickets, whether they were charge or cash tickets, and I mean by 'tickets,' the invoices here, and give them to our office girl, and she would process them during that day or at the end of the day, or during the next day. We usually were two or three days behind with them as any business is, and in processing them she would by some kind of a list or recording method, would note the number of units that were allowed, the units being, just for instance, a gasket, as I said, would be one unit, or a box of tools might be another unit, some type of unit designation, and would cost the tickets. Now, whether the office girl did this costing or whether the order desk man or a Lawrence employee did it, I am not too clear on that, but somebody at least in the organization did cost them, arrive at our cost figure from catalogues, and so on.

"Q. Who handled the money, assuming I went in there and bought a gasket for $2.28, what became of that $2.28?

"A. The cashier would handle the money and put it in the cash register.

"Q. Well, would that be the Central Auto Supply or the Lawrence Warehouse, is what I am trying to get at?

"A. It would be the Central Auto Supply.

"Q. Then what became of that money?

"A. Well, the money was deposited in the bank account of the Central Auto Supply, or in some cases was used for paid-outs, small cash paid-outs, but it was used as any normal business would ue the money.

"Q. Do you know whether the Lawrence Warehouse employees had anything at all to do with the money that came in?

"A. Well, yes, in certain instances they would receive the money. In other words, generally the counter man, the head counter man, would be, at least, the Lawrence Warehouse employee. He would take the money of the cash sale from the customer and then give it to our cashier through a little cage.

"Q. And your cashier saw that it went into the bank to your account?

"A. That is correct.

"Q. And you had it for any expenses that you had in the business, the expenses or the payment of the indebtedness to the Valley Bank or anything else?

"A. Any place it could be used, yes, that is correct.

"Q. I wish you would give the Court one more illustration, Mr. Kersting. Supposing you were buying from a distributor on an open account and the distributor shipped goods to you on an open account, how, then, were those goods handled? In other words, what I am trying to get at is, did that go into the Lawrence Warehouse inventory and warehouse receipts issued against them.

"A. That is correct, yes, they were handled like any—I mean, whether we paid cash for goods that came in or whether they came in on credit, they still went right into the Lawrence Warehouse System.

"Q. In other words, if a distributor sold you goods on credit, then am I correct, that as soon as those goods arrived and before they had been paid for by you, they were placed in this inventory and the Lawrence Warehouse Company issued its warehouse receipt to the Valley Bank for that?

"A. Well, the first part of your question, yes, they were immediately put in the inventory and we, within due course of processing, as rapidly as possible reported them as entering the inventory, and then they were used, yes, as a credit, or sooner or later placed on some type of warehouse receipt.

"Q. Regardless of whether they had been paid for in cash or whether you had them on credit?

"A. That is right." (Tr 90-97).

The bank regarded its loans to the supply company as "secured", the security being the stock of merchandise (Tr 224).

Judgment was entered in favor of the defendants (Tr 21), motion for new trial (Tr 27) was denied (Tr 18) and the plaintiff has appealed (Tr 28), it being his contention that the entire scheme of "field warehousing", as disclosed by the record, is contrary to Section 62-522 of the Arizona Code of 1939, and that the judgment appealed from permits the defendants to accomplish by indirection that which is specifically prohibited by the statute of a sovereign state. The statute forbids a pledge of merchandise daily offered for sale; but the "field warehousing" arrangement under the judgment here for review permits the parties to do that very thing, and to give the bank a preference in the payment of its claim over substantially all of the other creditors of the bankrupt corporation.

SPECIFICATION OF ERRORS

1. The District Court erred in rendering judgment in favor of the defendants and against the plaintiff, because such judgment is not justified by the evidence and is contrary to law.

2. The District Court erred in failing and refusing to make adequate findings of fact upon the issues presented by the pleadings.

3. The District Court erred in adopting the findings of fact proposed by the defendant Lawrence Warehouse Company and signed by the District Judge, as such findings do not warrant the conclusions of law so made and signed and do not support the judgment.

4. The District Court erred in making its finding of fact number I, to-wit:

> "Long prior to filing its petition in bankruptcy Central Auto Supply Company transferred to Lawrence Warehouse Company for deposit certain goods, wares and merchandise." (Tr 19).

for the reason that there is no evidence to support such finding.

5. The District Court erred in making its finding of fact number II, to-wit:

> "Said goods, wares and merchandise were deposited in the field warehouse of Lawrence Warehouse Company theretofore leased by it from Cen-

> tral Auto Supply Company, and remained in the possession and control of the said Lawrence Warehouse Company thereafter." (Tr 19).

for the reason that there is no evidence to support such finding.

6. The District Court erred in making its finding of fact number III, to-wit:

> "At the time said goods, wares and merchandise were deposited with the said Lawrence Warehouse Company, that company issued certain uniform non-negotiable warehouse receipts at the direction of the depositor, Central Auto Supply Company and in favor of the Valley National Bank, Phoenix, a national banking association." (Tr 19-20).

for the reason that there is no evidence to support such finding.

7. The District Court erred in making its finding of fact number IV, to-wit:

> "Said uniform non-negotiable warehouse receipts were held by said bank as security for a loan in favor of Central Auto Supply Company." (Tr 20).

for the reason that there is no evidence to support such finding.

8. The District Court erred in making its finding of fact number V, to-wit:

> "Said transactions were in conformity with the usual commercial practice known as field warehousing." (Tr 20).

for the reason that there is no evidence to support such finding, and for the further reason that such purported finding of fact is wholly immaterial to the issues presented to the trial court.

9. The District Court erred in its conclusion of law number 1, viz:

> "The field warehouse lease between Central Auto Supply Company as lessor, and Lawrence Warehouse Company as lessee, dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated July 26, 1946, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse lease dated March 17, 1947, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated May 23, 1947, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated March 17, 1947, was a valid existing contract between the parties thereto." (Tr 20).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

10. The District Court erred in its conclusion of law number II, viz:

"The non-negotiable warehouse receipts issued by Lawrence Warehouse Company at the direction of the depositor, Central Auto Supply Company, in favor of the Valley National Bank, Phoenix, a national banking association, were valid warehouse receipts within the Arizona Uniform Warehouse Receipts Act, being Sections 52-801 through 52-849, Arizona Code 1939." (Tr 21).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

11. The District Court erred in its conclusion of law number III, viz:

"The pledge of the non-negotiable warehouse receipts and the pledge of such goods, wares and merchandise deposited with Lawrence Warehouse Company as warehousemen in favor of the Valley National Bank, Phoenix, as security for a loan to the Central Auto Supply Company, was a valid pledge as between the parties thereto and as against the plaintiff herein as trustee in bankruptcy of the Central Auto Supply Company and as against third parties, general creditors or otherwise." (Tr 21).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

12. The District Court erred in refusing to adopt and settle the finding of fact numbered "2" (as proposed by the plaintiff) viz:

"2. At all times here material, to and until its adjudication as a bankrupt as aforesaid, said

> Central Auto Supply Company was engaged in business as a merchant, and maintained its place of business at 601-603 East Adams Street, in Phoenix, Maricopa County, Arizona. At all such times said Central Auto Supply Company was the owner of a stock of goods, wares and merchandise, which it kept and maintained at its place of business aforesaid, and daily exposed the same to sale in parcels in the regular course of its merchandise business aforesaid." (Tr 24).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

13. The District Court erred in refusing to adopt and settle the finding of fact numbered "3" (as proposed by the plaintiff) viz:

> "3. For the purpose of attempting to create a lien upon or transfer of interest in said entire stock of goods, wares and merchandise, in violation of the provisions of Section 62-522 of the Arizona Code of 1939, said Lawrence Warehouse Company did, prior to the adjudication of said Central Auto Supply Company as a bankrupt as aforesaid, issue to said The Valley National Bank of Phoenix certain documents in the form of non-negotiable warehouse receipts, wherein and whereby said Lawrence Warehouse Company recited that said stock of goods, wares and merchandise was held by it in storage for said The Valley National Bank of Phoenix as attempted security for loans made by said The Valley National Bank

of Phoenix to said Central Auto Supply Company." (Tr 24-25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

14. The District Court erred in refusing to adopt and settle the finding of fact numbered "4" (as proposed by the plaintiff) viz:

> "4. At all times thereafter, to and until its adjudication in bankruptcy as aforesaid, said Central Auto Supply Company remained in the actual and physical possession of said goods, wares and merchandise, and had the actual control and merchandising and sale thereof and did actually make daily sales therefrom." (Tr 25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

15. The District Court erred in refusing to adopt and settle the finding of fact numbered "5" (as proposed by the plaintiff) viz:

> "The amount owing by Central Auto Supply Company to The Valley National Bank of Phoenix, as of the day of the date of its adjudication in bankruptcy herein, was thirty-one thousand one hundred fifty-five and 84/100 dollars, which was reduced by the sum of one hundred ninety-two and 20/100 dollars by the payment to said bank by the receiver of said Central Auto Supply Company of

> said sum of one hundred ninety-two and 20/100 dollars leaving a balance owing by said bankrupt corporation to said bank of thirty thousand eight hundred thirty-five and 53/100 dollars." (Tr 25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

16. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 2):

> "The entire scheme of 'field warehousing,' as disclosed by the record, is contrary to and violative of the provisions of section 62-522 of the Arizona Code of 1939; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

17. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 3):

> "The plaintiff herein, as trustee in bankruptcy of Central Auto Supply Company, represents in this action the general creditors of the bankrupt." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

18. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 4):

> "Section 62-522 of the Arizona Code of 1939 was not repealed or modified, in whole or in part, by implication or otherwise, by the adoption of the uniform warehouse receipt act in Arizona." (Tr. 26).

because such is the law applicable to the factual situation presented by the evidence.

19. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 5):

> "The defendants are not, nor is either of them, entitled to the possession of the stock of goods, wares and merchandise, in whole or in part." (Tr. 26).

because such is the law applicable to the factual situation presented by the evidence.

20. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 6):

> "The plaintiff is vested with the title to said stock of goods, wares and merchandise, and the whole thereof, and the right of possession thereof, under the provisions of Section 70 of the Act of Congress Relating to Bankruptcy, as amended." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

21. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 7):

> "Plaintiff is entitled to judgment, as prayed in his complaint." (Tr 26).

because under the uncontradicted evidence and the applicable law plaintiff is entitled to such relief.

22. The District Court erred in denying the plaintiff's motion for new trial, for the reasons stated in the foregoing specification of errors numbered 1 to 21, inclusive.

SUMMARY OF ARGUMENT

1. The entire scheme of "field warehousing", as disposed by the record, is contrary to Arizona law; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt.

2. The trustee represents in this action the general creditors of the bankrupt.

3. Section 62-522 of the Arizona Code of 1939 was not repealed or modified in whole or in part, by implication or otherwise, by the adoption of the Uniform Warehouse Receipts Act.

4. The fact that the Arizona Warehouse Receipts Act is a "uniform statute" does not require that it be given such construction as to render invalid the Arizona "no lien upon merchandise stock" law.

5. The construction placed upon the transaction by the bank, viz. "but back of the warehouse receipts, the security was the stock of merchandise" should be here controlling.

6. The courts of the United States are loath to nullify a state statute, except upon the most cogent of reasons.

ARGUMENT

I.

The Entire Scheme of "Field Warehousing", as Disclosed By The Record, Is Contrary To Arizona Law; And The Lien Or Pledge Of Merchandise Contemplated By Such Scheme Is Void As To General Creditors Of The Bankrupt.

Section 62-522 of the Arizona Code of 1939 reads as follows:

> "*Chattel mortgage of merchant's stock void.*— A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

In construing such statute, the Supreme Court of Arizona said:

> "We know of no other code with a provision exactly like the one quoted above. . . ."
>
> *Hartford Fire Insurance Company v. Jones,* 31 Ariz. 8, 250 P. 248, 249.

In denying a motion for re-hearing in that case (31 Ariz. 289, 252 P. 192) the court was careful to point out that one of the objects of the statute was the protection of *creditors* from secret liens or pledges, saying:

> "We believe on reconsideration that its purpose was to protect all innocent third parties, whether they be creditors or ordinary purchasers of such merchandise."

A somewhat similar (though by no means identical) statute was considered by the Court of Appeals for the Ninth Circuit in *In re Convisser,* 6 F. 2d 177, wherein the court, speaking through the late Circuit Judge Rudkin, said:

> "Section 2955 of the Civil Code prohibits the mortgage of the stock in trade of a merchant, and section 3440 prohibits the sale, transfer, or assignment in bulk of the stock in trade, or a substantial part thereof, without first giving or recording the notice therein prescribed. The manifest purpose of these provisions was to protect the stock in trade against liens and transfers of every kind for the benefit of general creditors. But, notwithstanding these express statutory prohibitions, the petitioner earnestly insists that a merchant may still pledge the whole, or a substantial part of his stock in trade, because a pledge is not a sale, transfer, or assignment, within the meaning of the law. With this contention we are unable to agree. As already stated, we think it was the plain purpose of the legislature to prohibit liens and transfers of every kind of the merchant's stock in trade, and that the language employed was ample for that purpose."

A Pennsylvania statute requiring the giving of notice of the assignment of accounts receivable was

under consideration in *Corn Exchange Nat. Bank & T. Co. v. Klauder,* 318 U. S. 434, 63 S. Ct. 679, 87 L. Ed. 884, 144 A. L. R. 1189. There the transaction was called "non-notification financing" (not "field warehousing", as the plan here under consideration is denominated by the defendants) and it was urged that if the law be enforced and the preferential creditor shorn of its illegal security, it would just about break the poor "non-notification financiers". The United States Supreme Court expressed its regret at so disastrous a result, but said:

> "The Circuit Court of Appeals has determined, and we accept its conclusion, that at all relevant times it was the law of Pennsylvania, where these transactions took place, that because of the failure of these assignees to give notice to the debtors whose obligations were taken, a subsequent good-faith assignee, giving such notice, would acquire a right superior to theirs. It held that the assignments were preferences under sec. 60(a) and therefore, under the terms of sec. 60(b), inoperative against the trustee.
>
> "This is undoubtedly the effect of a literal reading of the Act. Its apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good-faith purchaser. Only when such a purchaser is precluded from obtaining superior rights is the trustee so precluded. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By

thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law, although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of sec. 60(b).

"Such a construction is capable of harsh results, and it is said that it will seriously hamper the business of 'non-notification financing,' of which the present case is an instance. This business is of large magnitude and it is said to be of particular benefit to small and struggling borrowers. Such consequences may, as petitioners argue, be serious, but we find nothing in congressional policy which warrants taking this case out of the letter of the Act. . . ."

Where is there any difference in principle between the cause at bar and the Klauder decision?

Here we have a state statute designed to protect creditors against secret liens. We have also an ingenious scheme to thwart that statute and permit a bank to make loans upon a stock of merchandise intended for sale at retail and in the ordinary course of business. We have definite and uncontradicted proof

from the depositions of Harry Stock (Tr 120), C. R. Cadot (Tr 122), Paul S. Godber (Tr 126), J. C. Baldwin (Tr 132), Edward R. Tolfree (Tr 136), Frank A. Warburton, Jr. (Tr 139), M. Blackburn (Tr 142), David Shapiro (Tr 145) and F. C. Westphal (Tr 148) that the manufacturers, wholesalers and jobbers, who were (with the knowledge of Valley National Bank) selling goods to Central Auto Supply upon open account, had neither knowledge nor notice of the "field warehousing" plan under which such goods immediately became secret security for the loans made by Valley National Bank to the supply company.

The judgment of the trial court here upon review approves the plan of "field warehousing". It finds nothing wrong with it from a legal standpoint. It permits all of the stock of merchandise to be taken by a secret lienholder in contravention of the Arizona statute. It says, in effect, that although there is a state statute prohibiting such secret lien, it can be nullified by a paper contract and a row of chicken wire spread out and tacked up along the lines of the bankrupt's show room and warehouse ostensibly leased to the warehouse company. In this connection, the attention of the court is most respectfully invited to the testimony of Robert E. Kersting, found upon pages 92 and 93 of the transcript of record thus:

> "Q. Now, the portion of your warehouse or store room, or whatever it was that was leased to the Lawrence Warehouse Company as shown in the red lines on the pledge I showed you a few

moments ago, how was that separated from the balance of the building?

"A. Either by walls or built over wire gauging similar to chicken wire, and at the close of business each day it was more or less self contained in this chicken wire, in some cases by folding doors which could be folded shut and then locked with a padlock."

In principle, the cause at bar is not wholly dissimilar to that reviewed in *Security Warehousing Co. v. Hand,* 206 U. S. 415, 51 L. Ed. 1117, wherein it is said:

"The method taken to store the property was, as found by the district court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control; and such scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors."

II.

The Trustee Represents In This Action The General Creditors Of The Bankrupt.

As heretofore noted, the Arizona Supreme Court, in *Hartford Fire Insurance Company v. Jones,* 31 Ariz. 289, 252 P. 192, stated definitely that the Arizona statute declaring void all attempted liens upon stock

in trade was enacted "to protect all innocent third parties, whether they be creditors or ordinary purchasers of such merchandise."

The court of Appeals for the Ninth Circuit reached substantially the same conclusion with respect to the California statute in *In re Convisser,* 6 F. 2d 177, stating "The manifest purpose of these provisions was to protect the stock in trade against liens and transfers of every kind, for the benefit of general creditors."

Lest it be suggested that the Trustee stands in the shoes of the bankrupt and cannot, therefore, invoke the Arizona statute, the attention of the court is most respectfully invited to Section 70(c) of the Bankruptcy Act, whereby the Trustee is vested "with all of the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such creditor actually exists."

In *Hirschfeld v. McKinley,* 78 F. 2d 124, 135, the Court of Appeals for the Ninth Circuit (upon appeal from the District of Arizona) quoted approvingly from 1 Loveland on Bankruptcy, 4th Edition, Section 356, page 734, thus:

> "A trustee in bankruptcy represents the general or unsecured creditors, and his duties relate generally to their interests. He represents creditors of the bankrupt at the time the petition is filed, and not prior creditors. He represents all of the unsecured creditors and not any class or group of them."

There can be no question as to the rights of the trustee to maintain, upon behalf of the bankrupt's general creditors, this action to recover the property from those who hold the secret and invalid lien or pledge thereof under the so-called "field warehousing" plan.

III.

Section 62-522 Of The Arizona Code Of 1939 Was Not Repealed Or Modified In Whole Or In Part, By Implication Or Otherwise, By The Adoption Of The Uniform Warehouse Receipts Act.

Section 62-522 of the Arizona Code of 1939 is found as Section 3283 of the Revised Statutes (1901) of the Territory of Arizona. Article 8 of Chapter 52 of the Arizona Code of 1939 (warehouse receipts act) came into being as Chapter 47 of the Arizona Laws of 1921.

Thereafter, both statutes were re-enacted and became effective simultaneously, as a part of Senate Bill No. 100 of the 5th Special Session of the 8th Arizona Legislature, known as the Revised Code of 1928. See Chapter 18, Arizona Laws of 1929.

If, as apparently contended by defendants, the warehouse receipts act repealed or modified the statute voiding liens or pledges of the debtor's stock of merchandise, certainly some direct reference thereto would have been made in the 1928 Code.

The simultaneous re-enactment of both statutes in 1928 clearly demonstrates that the Legislature saw no conflict between them and intended that the law void-

ing liens or pledges of stocks of merchandise should remain in full force and effect.

Southern Pacific Company v. Gila County 56 Ariz. 499, 109 P. 2d 610.

Conway v. State Consolidated Publishing Company, 57 Ariz. 162; 112 P. 2d 218;

Peterson v. Central Arizona Light & Power Company, 56 Ariz. 231; 107 P. 2d 205;

State of Washington v. Maricopa County (9 Cir.) 152 F. 2d 556.

Of course, it is the rule that statutes should be so construed, where possible, as to give effect to every section and provision, and, in the event of an apparent conflict, such statutes should be harmonized where practicable.

Hill v. Gila County, 56 Ariz. 317; 107 P. 2d 377;

Powers v. Isley, 66 Ariz. 94; 183 P. 2d 880.

It is also the rule that repeal by implication is not favored, and will not be indulged if there is any other reasonable construction. This rule is well expressed by the Arizona Supreme Court in *Southern Pacific Company v. Gila County,* 56 Ariz. 499, 109 P. 610, 611, wherein it is said:

"It is not disputed by plaintiff that a statute may be repealed by implication, as well as by direct language, in a subsequent act of the legislature, and that such repeals do frequently occur, but it is also urged, as we have said in *Rowland v. McBride,* 35 Ariz. 511, 281 P. 207, 210:

> 'It should also be borne in mind that "repeals by implication are not favored, and will not be indulged, if there is any other reasonable construction." '
>
> "When the question of repeal by implication arises, if the later statute and the former can be construed so that both will be operative, it is the duty of the court to give them such a construction. *Biles v. Robey,* 43 Ariz. 276, 30 P. 2d 841. It is only when upon no reasonable construction both can be operative that it is our duty to hold that the later act repeals the former by implication. *Barnside v. School District No. 27,* 33 Ariz. 1, 261 P. 629."

Nor does it appear to plaintiff that the decision of the California District Court of Appeals, in *Sampsell v. Security-First Natl. Bank,* 207 P. 2d 1088, can be of much help to the defendants upon the question of implied repeal, for there it was urged and determined that the uniform receipts act repealed by implication earlier enactments of the California Legislature upon the "general business of conducting a public warehouse." Here, in order for the defendants to prevail, they must establish that the Uniform Warehouse Receipts Act repealed by implication the Arizona statutory provision rendering void secret liens on stocks of merchandise. Besides, we are here concerned with the substantive law of Arizona and not that of California, and are bound by the rule set forth in *Bacon v. Texas,* 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132 (referred to in the decision of the Court of Appeals for the Ninth

Circuit, in *State of Washington v. Maricopa County,* 152 F. 2d 556, 559) to the effect that the question whether a subsequent codification of an existing statute was or was not a mere revision and continuation of existing law, and whether the changed phraseology properly called for a change of construction, *are questions for the state court to determine.*

IV.

The Fact That The Arizona Warehouse Receipts Act Is A "Uniform Statute" Does Not Require That It Be Given Such Construction As To Render Invalid The Arizona "No Lien Upon Merchandise Stock" Law.

Defendants, in their brief presented to the trial court, said:

> "The Supreme Court of Arizona has announced an interpretation of the Uniform Warehouse Receipts Act, in relation to local laws, as follows:
>
> > " 'Local laws must be interpreted in the light of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world.' *S. R. V. W. U. A. v. Peoria Ginning Co., 27 Ariz. 145, 231 Pac. 415.*
>
> "This question has been adjudicated in the 9th Circuit Court of Appeals in the United States in the case of *Heffron v. Bank of America Natl. Trust & Sav. Assn., et al.,* 113 Fed. (2) 239, holding that the delivery of the goods to a warehouseman upon issuance of receipts and the subsequent

delivery of the receipts as security for a loan was valid as against third persons, including the trustee in bankruptcy. To the same effect is *Union Trust Company v. Wilson,* 198 U. S. 530, 49 L. Ed. 1154, 25 S. Ct. 766.

"In *Sampsell v. Lawrence Warehouse Company,* 167 Fed (2) 885, decided by the 9th Circuit Court of Appeals June 9, 1948, the court again announced the necessity for construing the Uniform Warehouse Receipts Act so as to make uniform the law of the states which have enacted it. That court cites also the case of *Commercial Natl. Bank of New Orleans v. Canal-Louisiana Bank and Trust Co.,* 239 U. S. 520, 36 S. Ct. 194, 60 L. Ed. 417, to the same effect.

"In view of the evidence in this case to the end that possession was in Lawrence Warehouse Company at the time warehouse receipts were issued for the goods and remained there until order of the holder of the warehouse receipts, and in view of the uncontroverted state of the law with respect to the Uniform Warehouse Receipts Act, the statute relied upon by plaintiff cannot apply and judgment must be for the defendants."

It is submitted that the statement that the goods "remained there until order of the holder of the warehouse receipts" may not be strictly accurate, as appears from the testimony of Kersting and Saxon, previously quoted in the "Statement of the Case" herein; and from the testimony of Austin K. Wildman, former Assistant Cashier and Loan Officer of the Valley

National Bank, it would appear that the goods were released by blanket authorization prior to their actual sale by the supply company. Here is what Wildman says:

"A. Well, to start with, they brought in one receipt covering all of the inventory that had been placed in the Lawrence Warehouse. We made a loan on a certain per cent of that—the value of that inventory that was placed in the Lawrence Warehouse. The arrangement through a written authorization that we gave to the Lawrence Warehouse, they could deliver upon request of the Central Auto Supply, inventory up to a certain dollar amount. When it reached that dollar amount, and I don't recall what its release provisions were, a release would be prepared on what they called a 'confirmation of delivery.' That confirmation of delivery would be brought into the bank; one copy would bear the signature of an officer of the Central Auto Supply, indicating that that merchandise had been delivered to them. They would bring in a check equal to the same percentage that we had loaned on that merchandise. In other words, if it was 65 per cent that we had loaned on it, they would bring in a check for that release, that check to apply to reduce the loan. They would bring in—the Bank would then execute that release when they had received the payment on it. Now, under the authorization given by the Bank of Lawrence, they required that those confirmation of deliveries be submitted at least

once each week. If the commodities delivered reached a certain dollar value before the week was out, they would have to bring them in and get them executed, get the Bank to sign a release before they could deliver more merchandise.

"Q. And at the same time would they be required to bring in a check for the amount covering that?

"A. Yes, that is the way the transaction started out. Now, later on, they would be short of funds, so—and having received additional merchandise they would sometimes bring in another warehouse receipt covering merchandise of a value approximately of what was being released and we would accept that as substitute collateral in place of reducing the loan.

"Q. And under those circumstances you would then also execute a confirmation of delivery and let the Warehouse Company deliver further goods?

"A. Yes, that would be a means of effecting the substitution.

"Q. In other words, they were just paying with more goods for security rather than paying in money?

"A. That is right.

"Q. And Mr. Wildman, with respect to those confirmation of delivery sheets, were they in all cases returned to the Lawrence Warehouse Company?

"A. Those came in to us in triplicate. The original was sent to the Lawrence Warehouse Com-

pany's Los Angeles office, one copy was retained by the Bank for their record, and one copy returned to the Lawrence Warehouse manager at the warehouse.

"Q. Now, throughout these negotiations, Mr. Wildman, and throughout this credit arrangement, did you, on behalf of the Bank, actually deliver to the Lawrence Warehouse instructions with respect to the releasing of these goods?

"A. Yes, that was written instructions, and when there is any change made, we write complete new instructions.

"Q. And were those instructions also delivered to the Central Auto Supply, or were they advised of such instructions?

"A. No, I—those instructions would be written up in triplicate and usually sent to the Lawrence Warehouse Company's office at Los Angeles, although sometimes they would be delivered to Mr. Mitchell or some other Lawrence Warehouse examiner here in Phoenix." (Tr. 215-17).

But, regardless of the strict accuracy or inaccuracy of such statement, it must appear that the defendants are overly optimistic when they attempt to derive comfort from the decisions stating that the warehouse receipts act should be construed uniformly by the several states which have adopted it. Plaintiff has never contended otherwise.

The Bankruptcy Act, too, is a uniform statute, applicable throughout the length and breadth of the United States, yet it has never, so far as plaintiff is

advised, been so interpreted as to permit the creation of a secret lien, denounced by state statute, in favor of one creditor and to the detriment of others.

If defendants' contention is correct, then the various state statutes relating to debtor's exemptions of real and personal property should all be considered as scrapped (instead of given effect as they now are) by the Bankruptcy Act. See *in re Shepardson,* 28 F. 2d 353, 355.

V.

The Construction Placed Upon The Transaction By The Bank viz. "But Back Of The Warehouse Receipts, The Security Was The Stock Of Merchandise" Should Be Here Controlling.

As heretofore demonstrated, the trustee stands in the shoes of an execution creditor.

No negotiable warehouse receipt was issued by Lawrence Warehouse Company to Central Auto Supply or to the Valley National Bank. The receipt was issued directly to the bank and great care was taken by the defendants to establish beyond question that it was non-negotiable in denomination, form and effect.

It stands undisputed in the record that the goods sold upon open account by general creditors of the supply company were immediately delivered by the supply company into the portion of the building leased to Lawrence Warehouse and the warehouse company thereupon issued its non-negotiable receipt to the bank.

If any of the creditors now represented by the plaintiff herein, trustee in bankruptcy for the supply company, had known of the secret arrangement between the parties, a levy by execution or attachment would have been available. Section 52-820 of the Arizona Code of 1939 applies to negotiable warehouse receipts only.

If any of such creditors had known what was happening to the merchandise they shipped to the supply company, certainly they would not have continued to make such shipments. The testimony of the witnesses Stock, Cadot, Godber, et al (Tr 120-150) is clear and uncontradicted in this respect.

VI.

The Courts Of The United States Are Loath To Nullify A State Statute, Except Upon The Most Cogent of Reasons.

The judgment here for review does not determine that the Arizona statute forbidding secret liens on stocks of merchandise is in any way invalid. It simply says, in effect, that it is rendered inoperative when applied to the facts of this case, because of the use of the lease, wire fence and warehouse receipts. It permits the defendants to "get around" the Arizona law through the use of a very clever scheme which they term "field warehousing", contemplating that the "warehouseman" moves into the merchant's place of business, erects some wire fences, posts some signs, issues some non-negotiable warehouse receipts to a lend-

ing agency and thereby creates a lien in favor of the lending agency, so that upon insolvency of the merchant the lending agency grabs all of his stock in trade and leaves his general creditors without remedy. The effectiveness of the Arizona statute is as completely destroyed by such judgment as it would have been had the trial court declared the act repugnant to some provisions of the United States Constitution.

Even if the validity of the Arizona act had been challenged as in contravention of a Federal constitutional provision, such challenge should not have been sustained unless the asserted invalidity of the act were demonstrated beyond all reasonable question.

The rule set forth in the early case of *Butler v. Commonwealth,* 51 U. S. 402, 13 L. Ed. 474, 478 is still effective:

> "The high conservative power of the federal government here appealed to is one necessarily involving inquiries of the most delicate character. The States of this Union, consistently with their original sovereign capacity, could recognize no power to control either their rights or obligations, beyond their own sense of duty or the dictates of natural or national law. When, therefore, they have delegated to a common arbiter amongst them the power to question or to countervail their own acts or their own discretion in conceded instances, such instances should fall within the fair and unequivocal limits of the concession made. *Accordingly it has been repeatedly said by this court, that*

to pronounce a law of one of the sovereign states of this union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be so denominated, if it can upon any other principle be correctly explained. Indeed, it would seem that, if there could be any course of proceeding more than all others calculated to excite dissatisfaction, to awaken a natural jealousy on the part of the states, and to estrange them from the federal government, it would be the practice, for slight and insufficient causes, of calling on those states to justify, before tribunals in some sense foreign to themselves, their acts of general legislation." (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, it is most respectfully insisted that the judgment of the District Court be reversed.

Respectfully submitted,

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